MOTION FILED
NOV - 6 1997

(5)

No. 97-605

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

BEN OEHRLEINS AND SONS AND DAUGHTER, INC., *et al.*,
Petitioners,
v.
HENNEPIN COUNTY, MINNESOTA,
Respondent.

ROBINSON RUBBER PRODUCTS CO., INC., *et al.*,
Petitioners,
v.
HENNEPIN COUNTY, MINNESOTA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* THE MAYORS' TASK FORCE AGAINST WASTE FLOW IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2(b) of the Rules of this Court, *amicus*, The Mayors' Task Force against Waste Flow, respectfully moves for leave to file the attached brief

amicus curiae in support of petitioner. Petitioner has consented to the filing of the brief and a copy of petitioner's written consent has been filed with the Clerk of this Court. This motion is necessary because the respondent Hennepin County has withheld consent.

Amicus, an association of 240 mayors from New Jersey has a strong interest in legal matters that affect the standing of solid waste generators. The constituents of the Mayors' Task Force against Waste Flow represent a significant portion of the generators of solid waste.

Because the question presented by the petition is of great importance to *amicus, amicus* respectfully moves for leave to file the attached brief *amicus curiae* in support of petitioner.

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BRIEF OF *AMICUS CURIAE* THE MAYORS' TASK FORCE AGAINST WASTE FLOW IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

Amicus is an association of Mayors from the State of New Jersey.* In 1994, the Mayors' Task Force was formed by a small group of Mayors to petition and advise the United States Congress (particularly the New Jersey delegation) of local communities' view of waste flow control regulations. The Mayors' Task Force quickly grew to 240 mayors from all across the state, including from 7 of the 10 largest cities.

* No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

The Mayors have continued to highlight the concerns of local municipalities that waste flow control contributes to New Jersey's dubious position as having the highest disposal fees in the nation. The monopolies or "favored" facilities are free to charge tipping fees substantially higher than otherwise available in the open market.

The purpose of this *amicus curiae* brief is to provide the Court with a local public sector perspective. Waste flow control has been described ostensibly as providing safe and efficient disposal of garbage. While the Mayors' Task Force recognizes, appreciates and vigorously supports such goals, waste flow control supports neither of these goals. Our municipalities are generators of sold waste and forced customers of the so-called favored facilities.

SUMMARY OF ARGUMENT

The intent, purpose and effect of local flow control is to generate revenue for favored facilities. The ultimate cost of which is borne by the generators of the garbage. The generators are thus directly harmed by the flow control. The generators should have the right to seek relief in Federal Court.

If haulers pass the cost of flow control to the generators, it is the generators who are best suited to challenge the discriminatory law. A policy of preventing the consumer from having his day in court is a dangerous precedent for the day that a right is not asserted.

ARGUMENT

A GENERATOR OF SOLID WASTE MUST HAVE STANDING TO ASSERT A CLAIM FOR A VIOLATION OF THE COMMERCE CLAUSE.

Local governments are generators of solid waste like any other entity. The purpose of flow control is to enhance the "favored facilities" financial status. In many

cases, the facility is a county operated utility authority. These utility authorities are distinct creatures from municipalities. Often, they have little accountability to municipalities. With flow control, they have found financial bonanzas—at the expense of municipalities.

In New Jersey, the effect of waste flow has led to the highest disposal rates in the nation, which in turn contributes to the highest property taxes. The issue of higher taxes is one faced squarely and solely by local governments. It is only since this Court's decision in *C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383 (1994) that our communities have seen a hint of relief. In our case, New Jersey resisted the holding of *Carbone* until forced to do so by the Court of Appeals in *Atlantic Coast Demolition & Recycling v. Board of Chosen Freeholders,* 112 F.3d 652 (3rd Cir. 1997).

The flow control laws most directly impact generators, or consumers, of solid waste disposal. They must have a say in the issues that arise from flow control. They must have recourse. If haulers are allowed to pursue claims, there will be no saving of judicial resources by allowing the generators their day in Court. County or State entities will not avoid the challenge to their system just because generators are refused the opportunity to present their claims. The generators are natural parties to litigation involving the regulator and regulated for they are served by the regulated entity and the regulator is theoretically looking out for their interests. However, when the consumer feels that the regulator is not serving his or her interest, the court opinion below states that the consumer is protected by the regulated entity. This turns on its head any notion of traditional utility workings.

Generators, including municipalities, are directly injured by the actions of the governmental entity enforcing flow control. They fall with the "zone of protection" provided by the Commerce Clause, as purchasers of interstate waste services.

The refusal to allow the consumers of solid waste disposal services to assert their claims risks insulating the county authorities from responsibility. If the party that is ultimately harmed as a result of the utility authorities unconstitutional actions is prevented from recourse, the authorities will have less incentive to act prudently. They will have little to no incentive to assure that their actions are commensurate with the law. Rather than err on the side of prudence, the utility authorities will act on the side of their own financial gain. Without the prospect of having to return excess tipping fees illegally collected, some officials may be inclined to press their unconstitutional system for extended periods of time to allow it to continue receiving this largess.

The Court needs look no further than New Jersey to see the results of this scenario. This Court decided *Carbone* on May 16, 1994. Despite the holding of *Carbone*, New Jersey continued to vigorously defend its system and the counties continued to collect exorbitant tipping fees. As of the writing of this brief, New Jersey continues to defend its system to the financial detriment of the generators.

After this Court's decision in *Carbone*, the Third Circuit Court of Appeals applying *Carbone* to New Jersey, held that New Jersey's regulations "discriminate against interstate commerce by restricting the access to out-of-state facilities to waste processing and disposal service markets," and could be sustained only if they fell within " 'a narrow class of cases in which the [government] can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.' " *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701 (3rd Cir. 1995). After this decision, New Jersey continued to defend its system. The counties continued to collect the tipping fees.

As both the Court of Appeals and the District Court recognized, New Jersey "vowed not to abandon its present

system until compelled to do so." *Atlantic Coast*, 48 F.3d at 718; *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 931 F. Supp. 341, 351 n.5 (D.N.J. 1996). New Jersey perpetuated its system to the detriment of the generator. If the generator lacks the ability to seek recourse in the Court, the government will only be emboldened to preserve its concededly unconstitutional system. Several of the mayors from the Mayors' Task Force were denied standing by the District Court in *Atlantic Coast* in an unpublished decision. Thus, the Mayors' Task Force has felt the sting of being silenced in the courtroom.

The issue here is whether the damaged party has a right to be heard. As large generators of solid waste and acutely sympathetic to the plight of *public* officials, the Mayors' Task Force supports the right of the generator to be heard.

CONCLUSION

For the reasons stated above, *amicus* urges this Court to grant a Writ of Certiorari.

Respectfully submitted,

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